companies and electric railway companies arising out of circumstances similar to those in the principal case. But in none of the cases does it seem to have been recognized that the principle of *Fletcher* v. *Rylands* was applicable. The leading American case perhaps is *Cumberland Telephone Co.* v. *United Ry. Co.*, 42 Fed. Rep. (Tenn.) 273. There *Fletcher* v. *Rylands* was very cursorily examined, and dismissed as not being in point. The court (Mr. Justice Brown) does not even seem to have taken the pains to ascertain what the decision in *Fletcher* v. *Rylands* really was. Now, however, that the analogy has been pointed out, it can hardly fail to receive attention in future litigation concerning damage caused by the lawful use of electricity. Since such cases are bound to arise with constantly increasing frequency, they may be the means of bringing the principle of *Fletcher* v. *Rylands* before the courts in many States where, strangely enough, the question has not yet been settled.

RESTRAINT OF TRADE. — The case of *Gamewell Fire Alarm Tel. Co.* v. *Crane et al.* (Massachusetts, not yet reported) shows the present position of the Massachusetts Supreme Court upon the question of contracts in restraint of trade. The defendant Crane agreed "not to engage in the business of manufacturing or selling fire-alarm or police-telegraph machines and apparatus, and not to enter into competition with the said Gamewell Co. either directly or indirectly, for the period of ten years next ensuing from the date of this agreement;" and this stipulation was held void, as in restraint of trade and contrary to public policy. Field, C. J., who writes the opinion, says: "So far as we are aware, in every modern case in this Commonwealth, except one [that one he distinguishes], where a contract in restraint of trade has been held valid, the restriction has been limited as to space. . . . The plaintiff did not buy the good-will of a . . . business; . . . it is an article of prime necessity for . . . large cities and towns; . . . the stipulation will tend to give the plaintiff a monopoly," and "may impair his [defendant's] means of earning a living. . . . The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff, . . . even if that should be the test, upon which we express no opinion." These are indications of six different tests of public policy, and the court are wary of pinning their faith upon any one. They conclude by saying that "if there is to be a change in the law, . . . we think that it is for the Legislature to make it." This case is a fair example of the Massachusetts view and of the present bad state of the law upon the subject. It must be worse restraint of trade to force a merchant to guard against all large contracts and against all negative personal agreements, in ignorance whether contracts about such things as police signals will be held bad because they affect "necessities" or because they "tend to monopoly," than it is to let a full-grown man agree not to deal in such "necessities." If we are to have this rule, we ought to have it stated so clearly that business engagements can be made with confidence. But why need we have this rule? As Mr. Eaton points out (4 HARVARD LAW REVIEW, 128 ff.), there is good authority and good reason for holding that the ultimate test is reasonableness. And if this is so, the doctrine of restraint of trade takes an unimportant place in the law, for elsewhere also equity will not enforce specific performance of an unreasonable agreement, and at law damages can be made to cover only so much of the

breach of contract as infringes on the other party's reasonable protection. The Massachusetts court are not necessarily so bound by prior decisions as they would indicate, for the question is clearly not one of law, but one of fact for the court, and the decision of it may properly be controlled by the change of the conditions of trade which has recently come about. In the light of present history, this is no longer an effective weapon against monopoly; taking trade as it is carried on to-day, such an agreement is not an unwarrantable restriction. Greater concentration and greater restraint are matters of every-day occurrence. If the condition of things is bad, it should be attacked to some purpose.

It is scarcely necessary to call attention in this connection to Mr. S. C. T. Dodd's article in the last number of the REVIEW. The authorities are collected and discussed in an article (cited *supra*) by Amasa M. Eaton, in 4 HARVARD LAW REVIEW, 128.

RECENT CASES.

AGENCY — INJURY TO SERVANT. — Plaintiff was one of a gang of workmen who together with a foreman were employed by defendants to unload a ship. While doing so, plaintiff was injured by the breaking of the necessary apparatus, caused by negligence in its construction. *Held*, that the rule that a master is bound to furnish safe appliances, and cannot escape liability for failure to do so by intrusting the duty to a servant by whose negligence a fellow-servant is injured, does not apply where several persons are employed to do certain work, and by the contract of employment, express or implied, they are to adjust the appliances by which the work is to be done. *Burns* v. *Sennett*, 33 Pac. Rep. 916 (Col.).

There is a difference of opinion upon the subject of the liability of the master under such circumstances. This case follows the English doctrine, which is also law in Massachusetts. *Killea* v. *Faxon*, 125 Mass. 485. In *Wilson* v. *Merry*, 1 L. R. H. L. Sc. 326, the Lord Chancellor says: "The master is not and cannot be liable to his servant, unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do." In every case the question whether an agent is employed as servant or as "independent contractor" is a question of intention, and therefore a question of fact. Where the agent is one who is recognized by the law as exercising a distinct calling, involving for its exercise a certain degree of skill or experience, there is a strong presumption that the employer did not reserve any control over one who presumably knows much better than himself how to do the work, and therefore such a person will not be the servant of the party employing him. Clerk and Lindsell on Torts, 46. In this country the doctrine established by the United States Supreme Court and by most of the courts of last resort in the different States is that the master is liable for the negligent performance of duties which rest by relation upon the master, whether the master perform such duties personally or through an agent or servant. *Hough* v. *Railway Co.*, 100 U. S. 213. In *Davis* v. *Central Vermont Ry. Co.*, 55 Vt. 84, the master was held liable for the negligence of his servant in the discharge of a duty which the master owed to a general workman.

BILLS AND NOTES — LIABILITY OF PARTIES WHOSE NAMES ARE NOT ON THE INSTRUMENT. — An action was brought on a note signed "T., Agt.," and it was alleged that T., "as agent for the defendant J., under and by direction . . . of J., and in the due management . . . of her business," made the note. *Held*, upon demurrer, that no cause of action was stated: (1) the general agency alleged did not give T. authority to bind J. by a promissory note; (2) the defendant's name was not upon the face of the instrument. *Bank* v. *Turner*, 24 N. Y. Supp. 793.

The court rely principally upon the want of any allegation that T. had authority to bind J. by a note, and distinguish the case from *Moore* v. *McClure*, 8 Hun, 557, where a note was signed "M., Agent," and recovery was allowed, on the ground that specific authority was there shown. The serious difficulty, however, seems to be that the defendant's name was not upon the face of the instrument; and that alone ought to pre-